IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1670

JAMES M. MILLEN - - - Petitioner-Appellant

versus

UNITED STATES OF AMERICA - Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JAMES M. MILLEN - - *Petitioner-Appellant*

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UNITED STATES OF AMERICA - *Respondent-Appellee*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

Petitioner was convicted of twenty (20) counts of unlawful distribution of a controlled substance in violation of 21 U.S.C. §841(a)(1) and one (1) count of involuntary manslaughter in violation of 18 U.S.C. §1111(a) and (b) in the United States District Court for the Western District of Kentucky at Louisville, Kentucky on February 6, 1978. His conviction was then appealed to the United States Court of Appeals for the Sixth Circuit which reversed the manslaughter conviction and affirmed the twenty (20) controlled substance counts on February 27, 1979. (Appendix A-1) Petitioner filed a Petition for Rehearing which was denied, as amended, on April 4, 1979. (Appendix A-2)

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was rendered and entered on February 29, 1979. Petitioner's Petition for Rehearing was denied as amended on April 4, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. **Whether the United States Court of Appeals for the Sixth Circuit Has Rendered a Decision in Conflict With a Decision of the United States Court of Appeals for the Fifth Circuit Regarding the Construction of the Controlled Substance Act.**

II. **Whether the Petitioner's Constitutional Rights to a Fair Trial Were Denied by Prosecutorial Misconduct.**

STATUTES INVOLVED

21 U.S.C. §841; 21 U.S.C. §842; 21 U.S.C. §843.

These statutes are set forth in full in the Appendix A-3.

STATEMENT OF THE CASE

On August 16, 1977, Bruce Howell died at the Fort Knox Military Reservation of an alleged overdose of a controlled substance, demerol hydrochloride. Petitioner, Dr. Millen, found Mr. Howell's body and telephoned the authorities from the scene. An investigation ensued and it was determined that the Petitioner was a close friend of the deceased and had treated him

for headaches. In his treatment, the Petitioner had prescribed demerol for the headache pain. A number of prescriptions, at least twenty-four (24), were found at various drug stores around the Fort Knox-Louisville area purportedly from Dr. Millen to Mr. Howell, for demerol. These prescriptions were dated from March of 1977 to August of 1977. The Petitioner denied that he had written all of these prescriptions and testified that the deceased had access to his prescription blanks at his home and office. A government handwriting analyst could not confirm that all of the prescriptions were written by Dr. Millen, although he testified that he thought many of them were. The demerol that was prescribed by the Petitioner for Mr. Howell was in tablet, or oral, form. However, some witnesses testified that Mr. Howell crushed the tablets and mixed them with water and injected them into his veins. There was no testimony that the Petitioner ever injected demerol into the deceased.

On November 8, 1977, a twenty-five (25) count indictment was returned against the Petitioner, James M. Millen, charging him with one count of 18 U.S.C. §1111, murder, and twenty-four (24) counts of violating 21 U.S.C. §841(a)(1), unlawful distribution of demerol hydrochloride, a controlled substance. The Honorable Thomas A. Ballantine, Jr., presided over the Trial by Jury in the United States District Court for the Western District of Kentucky which was held from January 23, 1978, through February 6, 1978.

At the trial of this matter, the government introduced a voluminous number of exhibits which had not

been furnished to the Petitioner pursuant to Rule 16 of the Federal Rules of Criminal Procedure, despite a court order that such items be produced prior to trial. At various times, Petitioner moved for continuance and/or a mistrial on the grounds that he had been unable to prepare a defense to these serious charges because of the government's non-compliance with the discovery rule.

The Petitioner, at the close of the government's case and at the close of the entire case, moved for a Judgment of Acquittal on the murder count of the indictment, on the grounds that the government had not proved a causal link between the Appellant's actions and the death of Bruce Howell. Those motions were overruled by the Trial Court. The Court gave instructions on second-degree murder and involuntary manslaughter. The Petitioner objected to those instructions.

Prior to trial and at trial, the Petitioner moved the Court to dismiss counts 2 through 25 of the indictment involving the alleged unlawful distribution of a controlled substance, on the grounds that the indictment was defective and the statute itself was unconstitutionally vague. Further, after those motions were overruled, Appellant requested instructions on the lesser included offenses involved in the Controlled Substances Act. The Court refused to give such instructions.

Prior to trial, the Petitioner moved the Court to order the government to advise the Petitioner of any agreement made between the government and a witness that might conceivably affect the witness's testimony at

the trial. During the trial, the Petitioner became aware that such an agreement had been reached between the government and the witness, Taylor Linkfield. The Court refused to declare a mistrial and/or grant a continuance on the Petitioner's motions.

During the trial of this matter there were numerous instances of prosecutorial misconduct of asking questions which were not proper and were clearly prejudicial to the rights of the Appellant. The Court refused to declare a mistrial in light of this misconduct.

The jury found the Petitioner guilty of involuntary manslaughter, a lesser included offense under second degree murder. The Petitioner was also found guilty of twenty (20) counts of the indictment involving the unlawful distribution of a controlled substance. One count of the indictment, count 19 was dismissed by the Court and the jury was unable to reach a verdict on three counts of the indictment, counts 8, 21 and 23. On February 7, 1978, judgment and commitment was entered ordering the Petitioner to serve three (3) years as to count one (1) and five (5) years each as to the remaining twenty (20) counts, and sentences to be served concurrently for a total sentence of five (5) years in the penitentiary. On February 2, 1978, the Court further ordered the Petitioner to surrender his Drug Enforcement Administration License. A Notice of Appeal was filed on February 7, 1978 regarding his conviction and on February 14, 1978 regarding the order requiring him to surrender his Drug Enforcement Administration License. The United States Court of Appeals for the Sixth Circuit entered its opin-

ion confirming in part and reversing in part on February 27, 1979. The Petitioner's petition for rehearing was denied on April 4, 1979.

The United States District Court for the Western District of Kentucky had jurisdiction in this case because the victim of the alleged crimes was a soldier stationed at the Fort Knox Military Reservation in Kentucky, and his death occurred there.

REASONS FOR GRANTING THE WRIT

I. The United States Court of Appeals for the Sixth Circuit Has Rendered a Decision in Conflict With a Decision of the United States Court of Appeals for the Fifth Circuit Regarding the Construction of the Controlled Substances Act.

The Petitioner was indicted for the unlawful distribution of a controlled substance, demerol hydrochloride pursuant to 21 U.S.C. §841(a)(1). That statute states in part as follows:

> (a) except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

Certain of these terms are defined in 21 U.S.C. §802 including; "(10) the term "dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of, a *practitioner,* including the prescribing and administering of a controlled substance . . . and (11) the term "dis-

tribute" means to deliver (*other than* by administering or *dispensing*) a controlled substance . . . ."

The Petitioner is a medical doctor. Thus, if he was to be charged under the statute he must be charged with dispensing since under the definition of the term, he would be a practitioner. However, he was charged with distributing a controlled substance. Petitioner moved the Trial Court to dismiss counts 2 through 25 of the indictment on the grounds that he was indicted for distribution and not dispensing the drug. For this proposition, the Petitioner cited *United States* v. *Leigh* (5th Cir., 1973) 487 F. 2d 206, where the Fifth Circuit held that in view of statutory distinction between distribution and dispensing of controlled substances, the indictment charging the Defendant, Leigh, a physician, with distributing substances by means of a prescription was insufficient to charge an offense.

The Sixth Circuit Court of Appeals, has decided the reverse in *United States* v. *Ellzey* (6th Cir., 1976) 527 F. 2d 1306, where a similar indictment was not defective because of the charge that a Defendant doctor was "distributing" rather than "dispensing."

Obviously, there is a conflict between the two circuits as to how those words must be construed in an indictment involving a physician.

In *Leigh, supra,* the Fifth Circuit stated that an indictment must specify the crime which is to be proved and the conduct must be an offense against the law and one may not be charged with one crime and convicted of another. The court construed the definitions and the above prohibition to mean that a doctor who adminis-

ters or prescribes a controlled substance is dispensing it rather than distributing it. The court held that such specific language cannot be ignored and therefore the indictment failed to charge an offense.

The Petitioner prays this court will resolve the conflict between those courts.

II. The Petitioner's Constitutional Rights to a Fair Trial Were Denied by Prosecutorial Misconduct.

The Petitioner's trial was marked by many cases of prosecutorial misconduct. The Court of Appeals, in its decision in this case, termed it "prosecutorial overkill." In fact, that court found conduct which exceeded the standards of fairness and due process exemplified by the holding in *Berger* v. *United States,* 295 U. S. 78 (1935). This misconduct was one of the bases for the reversal of the Petitioner's manslaughter conviction. However, the Sixth Circuit did not find the misconduct to be reversible error as to the drug counts.

The instances of prosecutorial misconduct are as follows. First, the prosecution failed to furnish the Petitioner with discovery items prior to trial, despite a court order to do so. Many of these items were furnished the defendant's counsel on the day of trial. These items included physical evidence including samples of blood, syringes, needles, and so on. Further, there were numerous prescriptions which the government intended to introduce at trial. The United States had all of these items from August of 1977 until the time of trial in January of 1978. The government had the opportunity to have numerous experts examine

these items and prepare its case. The Petitioner had a day or so to have the items examined and to prepare to defend against these charges. The Petitioner alleged at that time and continues to believe that this was patently unfair. The Court of Appeals in its decision in this case, stated,

> "We have reviewed with care appellant's claims that the Assistant United States Attorney in charge of this case had failed to comply with the District Court's order calling for discovery of documents and physical objects intended as exhibits at the trial. In a number of instances it is clear that the government did not furnish these exhibits until the eve of trial or after it had actually begun. In each instance, there was an objection, and in each such instance the District Judge, while refusing continuance of the trial or mistrial, did grant a delay in the admission of the withheld evidence until, in his judgment, defense counsel had had an opportunity adequately to prepare for cross-examination on the issue concerned. We note the government's argument that its failures were related to the difficulty of accumulating all of these materials in advance of trial. On the entire record of this case, we are inclined to view the government's assurances in this regard with some skepticism. We are not, however, prepared to say that, as to the issues directly bearing upon the drug convictions, the District Judge's remedial measures were completely inadequate or that they were beyond his discretion as a trial judge to employ."

The Petitioner firmly believes that the trial judge's rulings as to his motions for a mistrial and continuance

were an abuse of his discretion. A Defendant is entitled to prepare his defense and to have a fair trial. The government's foot-dragging and noncompliance, denied him those rights.

Rule 16(d)(2) of the Federal Rules of Criminal Procedure provides certain sanctions for failure of compliance. However, that rule is really too vague to serve as an adequate guideline. There was no good reason why the trial court did not grant a two or three week continuance as requested by the Petitioner. Clearly, the lack of sanctions imposed on the prosecution will lead to other similar acts in other cases. This court, in its supervisory position, cannot permit this to happen again. It must send a message that such actions will not be tolerated in the future by reversing the Petitioner's conviction.

A similar instance of prosecutorial misconduct was when the prosecution ignored a pretrial order that they advise the Petitioner of any agreements made between the government and its witnesses. Prior to trial, the Petitioner made a motion that such agreements be revealed and the court sustained that motion. However, during the trial, it came to the Petitioner's attention that there was a witness, Mr. Taylor Linkfield, who had reached an agreement with the government that he would not be prosecuted. When this matter came to the Petitioner's attention, he moved the court for a mistrial and/or a continuance, so that he might prepare a defense to the witness's testimony, and investigate the witness and the agreement so that the jury might have a better chance to weigh his credibility. A hearing was held on this matter, and it was determined that Mr. Linkfield had been told that he might be an unindicted co-conspirator in return for his testimony. Further, when he was called before the grand jury, the United States Attorney advised him that "as a result of your testimony, you are not to be charged. Do you understand that?" The trial judge expressed concern at that point that the Petitioner was not receiving a fair trial. However, the Petitioner's motion was denied. The cumulative effect of the noncompliance regarding this agreement and the noncompliance regarding the other discovery matters, were disastrous. The Petitioner's counsel even stated for the record, "I want the record to reflect that I cannot in my good conscience at this point give Dr. Millen effective representation, and I want that in the record." All of these "surprises" served to deny the Petitioner a fair trial.

There were numerous other occasions of prosecutorial misconduct in this matter, and perhaps the most serious one was when the prosecutor elicited a comment from a witness regarding the relationship between the deceased, Bruce Howell, and the Petitioner. This question and answer was determined by the Court of Appeals to be prejudicial, reversible error as far as the manslaughter conviction was concerned. The court stated on page 5 of its opinion,

> "Further, in vacating the involuntary manslaughter verdict, we rely upon the fact that the Assistant United States Attorney asked a question of witness Unseld which the Assistant United States Attorney must have known would evoke a specific and highly

prejudicial reply. The question, however, was so phrased as not to evoke any defense objection. The question and answer involved and the court's ruling thereon is as follows:

Q. What was the relationship between you and Doctor Millen and Bruce Howell?

A. It was one on a gay basis.

Mr. McCall: I want to object to that, Judge. May I approach the bench. Good Lord.

(Whereupon, at this point the following proceedings occurred at the bench between the court and counsel out of the hearing of the jury)

Mr. McCall: Judge, I move for a mistrial. That's uncalled for. I don't even know what the man's basis for this is.

By the Court: What does it have to do with it?

Mr. Partin: It's our position, Your Honor, that the relationship that existed between the defendant and the deceased and the—and this witness formed a basis for the defendant to write these prescriptions.

By the Court: Oh, no.

Mr. McCall: It's prejudicial as far as my client's rights under the Fourteenth Amendment, and I can't possibly get a fair trial.

By the Court: I'm going to sustain the objection. Overrule the motion and admonish the jury not to consider it.

(Whereupon, the following proceedings occurred in open court)

By the Court: Ladies and gentlemen of the jury, you will not consider that last question and answer for any purpose whatever in this trial.

Before this court the government now contends that the evidence should have been admitted. But

> neither in advance of eliciting the gay relationship testimony (which we believe to have been done intentionally) nor afterward did the Assistant United States Attorney make an offer of proof which spelled out for the District Judge his theory as to how the gay relationship, if it existed, was probative of the crimes charged in the indictment. This record simply reveals that a highly prejudicial answer was evoked; that the District Judge struck it on objection and instructed the jury to disregard it; and that the government made no effort then or later to justify admission of the evidence. On such a record, we cannot agree with its argument that the answer was admissible on its face. Clearly the prejudicial aspect of the answer given far outweighed any obvious or apparent probative value. See Fed. R. Evid. 403."

The Court of Appeals went on to find that this error was prejudicial as to the manslaughter conviction but not prejudicial as to the drug conviction. That decision was based on the "overwhelming nature of the proofs" as to those offenses. In Petitioner's petition for rehearing, it is pointed out that the court's decision on page 7 stated,

> "We have no doubt that prejudice from this episode could likewise have had some impact upon the jury's consideration of the drug charges."

The Petitioner pointed out to the court that this court has required a finding that such error was harmless beyond a reasonable doubt. In its denial of the Petition for Rehearing, the Court of Appeals amended

its opinion by stating that they found the prosecutorial abuse harmless beyond a reasonable doubt.

Petitioner simply cannot understand how this incident can be prejudicial, reversible error as to one conviction, but harmless beyond a reasonable doubt as to another conviction when both convictions were had at the same trial. It is quite obvious, that the Petitioner herein was denied a fair trial. The Sixth Circuit Court of Appeals has merely slapped the government on the hand. It has not in any way sanctioned the government for its conduct. By reversing a shorter concurrent sentence, the government has been told that it can get away with such misconduct. The Petitioner has continued to suffer from such misconduct. Pursuant to this court's decisions in *Chapman* v. *California,* 386 U. S. 18 (1967); *Harrington* v. *California,* 395 U. S. 250 (1969) and *Berger* v. *United States,* 295 U. S. 78 (1935), these abuses by the prosecution cannot be held to be harmless error. Petitioner firmly believes that the time is long past due when the government should not be given every advantage when a person's life and livelihood are at stake. Petitioner respectfully requests this court to grant this writ.

CONCLUSION

The reasons for granting the writ, as set forth above, show conflict between two United States Courts of Appeal on a statutory matter, and further clearly enunciate substantial questions of constitutional law. These issues have led to confusion and conflict in the lower courts and should be settled by this Court. We respectfully request this Court to grant Certiorari to decide these questions.

Respectfully submitted,

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APPENDIX

APPENDIX A-1

No. 78-5231

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

JAMES M. MILLEN, M.D., - - *Defendant-Appellant.*

Appeal from the United States District Court for the Western District of Kentucky

OPINION—Decided and Filed February 27, 1979

Before: EDWARDS, Chief Judge, WEICK, Circuit Judge and PECK, Senior Circuit Judge.

EDWARDS, Chief Judge, delivered the opinion of the Court, in which WEICK, Circuit Judge, joined. PECK, Senior Circuit Judge, (p. 8) filed a separate opinion concurring in part, dissenting in part.

EDWARDS, Chief Judge. Defendant Millen, a 61-year-old medical doctor, appeals from convictions on 20 counts of unlawful distribution of Demerol, a controlled substance, in violation of 21 U.S.C. § 841 (1976), and one count of involuntary manslaughter, in violation of 18 U.S.C. § 1112 (1976). The trial was before a jury in the United States

District Court for the Western District of Kentucky. After verdicts described above had been entered, the District Judge entered sentences of five years on each of the distribution counts, all to run concurrently, and three years on the count of involuntary manslaughter, likewise to run concurrently with the distribution sentences. Finding overwhelming evidence to support the convictions for distribution of Demerol, we affirm the convictions and sentences on the 20 counts for violation of 21 U.S.C. § 841 (1976), in spite of a number of instances of prosecutorial overkill.

As to the involuntary manslaughter count, we vacate the conviction and remand for new trial because we are by no means sure that the prosecution would have prevailed as to this count without resort to measures which exceed the standards of fairness and due process exemplified by the holding in *Berger* v. *United States,* 295 U. S. 78 (1935). We cannot apparently remind government counsel to often of the Berger standard:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
> *Id.* at 88.

THE DRUG COUNTS

Appellant was tried on an indictment encompassing 24 counts of unlawful distribution of the drug Demerol. The government offered proofs that defendant had written 23 prescriptions for Demerol for an army private named Bruce Howell prior to his death as a result of an overdose of Demerol on the Fort Knox Military Reservation. Government proofs in relation to this matter include testimony of a handwriting expert who testified that Dr. Millen wrote 23 of the prescriptions. It also included Dr. Millen's admission at trial that he had written some of the prescriptions introduced in evidence, although he testified that he had not known of Howell's employment of them for drug abuse purposes and that the prescriptions had been given for the treatment of headaches suffered by Howell. Testifying at the trial, Dr. Millen conceded that it would be against accepted medical practice for a physician to write a prescription for Demerol for a person whom he knew to be a drug addict. Dr. Millen also testified that Howell was a close friend and that he had employed him around his house and let him have access to his house where he kept prescription blanks.

The government also presented as a witness at trial Howell's wife, Dawn Howell. She testified that her husband was a drug addict; that he employed Demerol tablets for drug abuse purposes by crushing the tablets, mixing them with water, and injecting them in his veins; that she had seen Dr. Millen in her husband's company while her husband crushed Demerol tablets, made them into a solution and injected the solution in his viens, and that she had likewise seen Mr. Millen crush Demerol tablets, make them into a solution and inject them in his own veins.

Similar testimony was presented by the government by a male witness named Taylor Linkfield. The detailed testimony of these two witnesses, plus the condition of Howell's

body, as testified to by the pathologist who did the post-mortem, furnished strong evidence from which the jury could have found that Dr. Millen had, indeed, violated the statute by making Demerol prescriptions available to Howell for drug abuse rather than medical purposes.

We have reviewed with care appellant's claims that the Assistant United States Attorney in charge of this case had failed to comply with the District Court's order calling for discovery of documents and physical objects intended as exhibits at the trial. In a number of instances it is clear that the government did not furnish these exhibits until the eve of trial or after it had actually begun. In each such instance, there was an objection, and in each such instance the District Judge, while refusing continuance of the trial or mistrial, did grant a delay in the admission of the withheld evidence until, in his judgment, defense counsel had had an opportunity adequately to prepare for cross-examination on the issue concerned. We note the government's argument that its failures were related to the difficulty of accumulating all of these materials in advance of trial. On the entire record of this case, we are inclined to view the government's assurances in this regard with some skepticism. We are not, however, prepared to say that, as to the issues directly bearing upon the drug convictions, the District Judge's remedial measures were completely inadequate or that they were beyond his discretion as a trial judge to employ.

We recognize that appellant argued before the District Court, and argues before us, that the drug charges should have been dismissed because the indictment charged appellant with unlawful and knowing *distribution* of Demerol, and relies on *United States* v. *Leigh*, 487 F. 2d 206 (5th Cir. 1973), for his authority in this regard. This court has, however, decided that a charge of "distributing" rather than "dispensing" made against a physician who was a de-

fendant was a lawful and appropriate indictment. *United States* v. *Ellzey, M.D.*, 527 F. 2d 1306 (6th Cir. 1976). We decline to overrule the *Ellzey* case.

Under these circumstances, we affirm the convictions of the drug counts.

INVOLUNTARY MANSLAUGHER

As indicated above, appellant was also convicted on a charge of involuntary manslaughter. Count I of the actual indictment in this case, however, was an indictment for murder, with malice aforethought. It read:

COUNT I

> On or about the 16th day of August, 1977, at the Fort Knox Military Reservation, in the Western District of Kentucky, within the special territorial jurisdiction of the United States, James M. Millen, M.D. did, with malice aforethought, murder Bruce Howell by causing a quantity of demerol to be injected into his body.
>
> In violation of Sections 1111(a) and (b), Title 18, United States Code.

We have read this record with care to attempt to find justification for the United States Attorney's office having sought indictment of defendant on a charge of murder, with malice aforethought. We find none. We also feel that the District Judge was in error in denying appellant's motion for a directed verdict as to the first count, at least as it pertained to Section 1111(a). The jury was allowed to take into the jury room the indictment which alleged murder, with malice aforethought. It also had a verdict form which provided for a finding on the issue of second degree murder and/or involuntary manslaughter in the alternative. We believe that the submission of the issue of second degree murder, with malice aforethought, was prejudicial error

which may have influenced the jury finding of guilty on the charge of involuntary manslaughter.

Further, in vacating the involuntary manslaughter verdict, we rely upon the fact that the Assistant United States Attorney asked a question of witness Unseld which the Assistant United States Attorney must have known would evoke a specific and highly prejudicial reply. The question, however, was so phrased as not to evoke any defense objection. The question and answer involved and the court's ruling thereon is as follows:

> Q. What was the relationship between you and Doctor Millen and Bruce Howell?
>
> A. It was one on a gay basis.
>
> Mr. McCall: I want to object to that, Judge. May I approach the bench. Good Lord.
>
> (Whereupon, At This Point The Following Proceedings Occurred At The Bench Beween The Court And Counsel Out Of The Hearing Of The Jury)
>
> Mr. McCall: Judge, I move for a mistrial. That's uncalled for. I don't even know what the man's basis for this is.
>
> By the Court: What does it have to do with it?
>
> Mr. Partin: It's our position, Your Honor, that the relationship that existed between the defendant and the deceased and the—and this witness formed a basis for a motive for the defendant to write these prescriptions.
>
> By the Court: Oh, no.
>
> Mr. McCall: It's prejudicial as far as my client's rights under the Fourteenth Amendment, and I can't possibly get a fair trial.
>
> By the Court: I'm going to sustain the objection. Overrule the motion and admonish the jury not to consider it.
>
> (Whereupon, The Following Proceedings Occurred In Open Court)
>
> By the Court: Ladies and gentlemen of the jury, you will not consider that last question and answer for any purpose whatever in this trial.

Before this court the government now contends that the evidence should have been admitted. But neither in advance of eliciting the gay relationship testimony (which we believe to have been done intentionally) nor afterward did the Assistant United States Attorney make an offer of proof which spelled out for the District Judge his theory as to how the gay relationship, if it existed, was probative of the crimes charged in the indictment. This record simply reveals that a highly prejudicial answer was evoked; that the District Judge struck it on objection and instructed the jury to disregard it; and that the government made no effort then or later to justify admission of the evidence. On such a record, we cannot agree with its argument that the answer was admissible on its face. Clearly the prejudicial aspect of the answer given far outweighed any obvious or apparent probative value. *See* FED. R. EVID. 403.

In the face of the government's complete failure to present to the District Court a reasoned argument for the admissibility of this evidence out of the presence of the jury, or by means of an offer of proof,[1] we decline to speculate about grounds for admissibility which clearly are not present in this record. It seem apparent to us that the Assistant United States Attorney cleverly evoked a highly prejudicial answer by asking a question which was unlikely to trigger objection. Subsequently he must have felt he had rung the bell and was content to let the District Judge try to unring it, if he could.

We have no doubt that prejudice from this episode could likewise have had some impact upon the jury's consideration of the drug charges. Our affirmance of those convictions rests entirely upon the overwhelming nature of the

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[1] *See* FED. R. EVID. 103.

proofs as to those offenses. The government's case as to involuntary manslaughter rests upon a much more tenuous basis.

The District Court's judgments of convictions on the drug counts are affirmed. The District Court's judgment of conviction as to involuntary manslaughter is vacated and this aspect of the case is remanded to the District Court for further proceedings.

PECK, Senior Circuit Judge, concurring in part, dissenting in part. I concur in the affirmance of defendant-appellant's conviction under the twenty counts for violation of 21 U.S.C. § 841 (1976), and in the vacation of the conviction as to the involuntary manslaughter charge, and dissent only from the majority's remand for retrial. As is clearly demonstrated in the majority opinion, the United States attorney was guilty of questionable action in requesting and obtaining an indictment for murder "with malice aforethought," and of censorable conduct in eliciting the gay relationship testimony which forms the basis for the vacation of the manslaughter conviction and which we unanimously "believe to have been done intentionally." The Government thereafter argued that this testimony was admissible, but neither by a preliminary showing nor by a subsequent proffer of proof did it present any evidentiary basis for that contention. The remand would presumably open the door for the Government to do that which it declined an opportunity to do at trial. I do not feel that it is entitled to another bite at the apple.

Given the fact that defendant was sentenced to twenty valid concurrent 5-year prison terms, we should exercise our discretion to simply vacate a twenty-first invalid concurrent 3-year term, and not permit the United States attorney to subject the defendant to another trial, necessary only because of the Government's misconduct at the first trial. *United States* v. *Brown*, 529 F. 2d 962, 970 (1976).

APPENDIX A-2

No. 78-5231

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

JAMES M. MILLEN, M.D., - - *Defendant-Appellant.*

ORDER—Filed April 4, 1979

Before: EDWARDS, Chief Judge, WEICK, Circuit Judge, and PECK, Senior Circuit Judge.

On receipt and consideration of a motion for rehearing filed in the above-styled case,

Said motion is denied in all respects except that the Slip Opinion of the court, issued February 27, 1979, is hereby amended by adding after the word "offenses" on page 8, line 1, the following words:

> and the fact that, as to these counts, the prosecutorial abuse outlined above was harmless beyond reasonable doubt. *Chapman* v. *California*, 286 U. S. 18 (1976),

Entered by order of the Court
(s) John A. Hehman
Clerk

APPENDIX A-3

STATUTES INVOLVED

21 U.S.C. §841

Prohibited acts A—Penalties

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Except as otherwise provided in section 405 [21 USCS § 845], any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a

felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (8) of section 404 [21 USCS § 844(a)(b)].

(c) A special parole term imposed under this section or section 405 [21 USCS § 845] may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of

the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 405 [21 USCS § 845] shall be in addition to, and not in lieu of, any other parole provided for by law. (Oct. 27, 1970, P.L. 91-513, Title II, Part D, § 401, 84 Stat. 1260).

21 U.S.C. §842

Prohibited acts B—Penalties

(a) It shall be unlawful for any person—

(1) who is subject to the requirements of part C [21 USCS §§ 821-829] to distribute or dispense a controlled substance in violation of section 309 [21 USCS § 829];

(2) who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration;

(3) who is a registrant to distribute a controlled substance in violation of section 305 of this title [21 USCS § 825];

(4) to remove, alter, or obliterate a symbol or label required by section 305 of this title [21 USCS § 825]:

(5) to refuse or fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under this title or title III;

(6) to refuse any entry into any premises or inspection authorized by this title or title III;

(7) to remove, break, injure, or deface a seal placed upon controlled substances pursuant to section 304(f) or 511 [21 USCS § 824(f) or 881] or to remove or dispose of substances so placed under seal; or

(8) to use, to his own advantage, or to reveal, other than to duly authorized officers or employees of the United States, or to the courts when relevant in any judicial proceeding under this title or title III, any information acquired in the course of an inspection authorized by this title concerning any method or process which as a trade secret is entitled to protection.

(b) It shall be unlawful for any person who is a registrant to manufacture a controlled substance in schedule I or II which is—

(1) not expressly authorized by his registration and by a quota assigned to him pursuant to section 306 [21 USCS § 826], or

(2) in excess of a quota assigned to him pursuant to section 306 [21 USCS § 826].

(c) (1) Except as provided in paragraph (2), any person who violates this section shall, with respect to any such violation, be subject to a civil penalty of not more than $25,000. The district courts of the United States (or, where there is no such court in the case of any territory or possession of the United States, then the court in such territory or possession having the jurisdiction of a district court of the United States in cases arising under the Constitution and laws of the United States) shall have jurisdiction in accordance with section 1355 of title 28 of the Uinted States Code to enforce this paragraph.

(2) (A) If a violation of this section is prosecuted by an information or indictment which alleges that the

violation was committed knowingly and the trier of fact specifically finds that the violation was so committed, such person shall, except as otherwise provided in subparagraph (B) of this paragraph, be sentenced to imprisonment of not more than one year or a fine of not more than $25,000, or both.

(B) If a violation referred to in subparagraph (A) was committed after one or more prior convictions of the offender for an offense punishable under this paragraph (2), or for a crime under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of $50,000, or both.

(3) Except under the conditions specified in paragraph (2) of this subsection, a violation of this section does not constitute a crime, and a judgment for the United States and imposition of a civil penalty pursuant to paragraph (1) shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense.

(Oct. 27, 1970, P.L. 91-513, Title II, Part D, § 402, 84 Stat. 1262.)

21 U.S.C. §843

Prohibited acts C—Penalties

(a) It shall be unlawful for any person knowingly or intentionally—

(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of

his legitimate business, except pursuant to an order of an order form as required by section 308 of this title [21 USCS § 828];

(2) to use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this title or title III; or

(5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit substance.

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or its acts constituting a felony under any provision of this title or title III. Each separate use of a communciation facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

(c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

(Oct. 27, 1970, P.L. 91-513, Title II, Part D, § 403, 84 Stat. 1263.)

No. 78-1670

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES M. MILLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-24) is reported at 594 F. 2d 1085.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1979. A petition for rehearing was denied on April 4, 1979 (Pet. App. 25). The petition for a writ of certiorari was filed on May 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment failed to state an offense under 21 U.S.C. 841(a)(1) because it charged petitioner, a physician, with unlawfully "distributing," rather than "dispensing," a controlled substance.

2. Whether prosecutorial misconduct deprived petitioner of a fair trial.

STATUTES INVOLVED

1. 21 U.S.C. 802 provides in part:

As used in this subchapter:

* * * * *

(10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

(11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance. The term "distributor" means a person who so delivers a controlled substance.

* * * * *

(20) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

* * * * *

2. 21 U.S.C. 841 provides in pertinent part:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance * * *.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on 20 counts of unlawful distribution of Demerol, a controlled substance, in violation of 21 U.S.C. 841(a)(1) (Counts 2-7, 9-18, 20, 22, 24, 25), and one count of involuntary manslaughter, in violation of 18 U.S.C. 1112 (Count 1).[1] He was sentenced to concurrent terms of five years' imprisonment on each of the illegal distribution counts and three years' imprisonment on the involuntary manslaughter count. The court of appeals affirmed the illegal distribution convictions. The court vacated the conviction for involuntary manslaughter, however, and remanded for a new trial on that count (Pet. App. 17-24).[2]

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[1]The district court dismissed Court 19 of the indictment, and the jury was unable to reach a verdict as to Counts 8, 21 and 23.

[2]The court of appeals vacated the conviction on the manslaughter count because it concluded that the district court had erred in submitting the issue of second degree murder with malice aforethought to the jury and that this error prejudiced the jury's consideration of the charge of voluntary manslaughter (Pet. App. 21-22). The court also relied on the fact that the prosecutor had attempted to establish that there was a homosexual relationship between petitioner and the victim without first showing a need for that evidence. *Id.* at 23.

The evidence adduced at trial showed that petitioner, a physician with a medical practice in Bardstown, Kentucky, began prescribing Demerol for Bruce Howell in February 1977 (III Tr. 178-179). Between March 23, 1977, and April 29, 1977, petitioner wrote six prescriptions for a total of 158 tablets of Demerol for Howell.[3] Occasionally, after writing a prescription for Demerol, petitioner would give Howell the money to pay for it (I Tr. 119-120, 155-156). After dissolving the Demerol tablets in water, petitioner or Howell would inject the solution in the other's veins (I Tr. 142-143, 166-167).

On April 29, 1977, Howell, suffering the effects of a growing dependency on Demerol, was admitted for treatment at the Fort Knox Alcohol and Drug Rehabilitation Center. He remained a patient in the drug rehabilitation program until August 1, 1977, when he was transferred to a hospital at Fort Gordon, Georgia. While Howell was under treatment at Fort Knox, petitioner wrote Howell 14 more prescriptions for 593 Demerol tablets (II Tr. 71-74).[4]

Following Howell's discharge from the Fort Gordon hospital, petitioner wrote four more prescriptions for 172 Demerol tablets for Howell between August 13 and 16, 1977.[5] As with the other prescriptions, Howell and petitioner would crush the Demerol tablets, mix water with the powder, and give themselves intravenous injections (II Tr. 167-172). In the early morning hours of August 17, 1977, petitioner, who apparently had been sleeping at Howell's residence, notified the authorities of

[3]These prescriptions formed the basis for Counts 2 through 7.

[4]These prescriptions formed the basis for Counts 8 through 21.

[5]These prescriptions formed the basis for Counts 22 through 25.

Howell's death (I Tr. 17-19, 43-44). The results of an autopsy indicated that Howell died of an overdose of Demerol (I Tr. 178-180).

Testifying in his own behalf, petitioner admitted that he had written some of the prescriptions that were introduced into evidence. He claimed, however, that he had not known that Howell had been using the drugs for improper purposes (IV Tr. 21-25; III Tr. 185-186).

ARGUMENT

1. Petitioner argues (Pet. 6-8) that a physician (or other "practitioner") may be indicted under 21 U.S.C. 841(a) only for unlawful "dispensing" of drugs and not for unlawful "distributing." This contention is insubstantial.

The term "dispense" under the Controlled Substances Act means to deliver a controlled substance "to an ultimate user * * * by, or pursuant to the *lawful* order of, a practitioner * * *" (21 U.S.C. 802(10); emphasis supplied).[6] Dispensing is lawful under the Act only when done by a practitioner "in the course of professional practice." See 21 U.S.C. 802(20); *United States* v. *Moore*, 423 U.S. 122, 131-133 (1975). Several courts have correctly concluded that a physician who prescribes or administers drugs other than for a professional purpose is not "dispensing" drugs within the meaning of the Act; instead, he is engaged in the unlawful distribution of drugs, which is defined by the Act to mean the delivery of a controlled substance "other than by administering or dispensing" (21 U.S.C. 802(11)). *United States* v. *Fellman*, 549 F. 2d 181, 182 (10th Cir. 1977); *United States* v.

[6]A "practitioner" is defined as "a physician * * * licensed, registered, or otherwise permitted * * * to * * * dispense * * * *in the course of professional practice* * * *" (21 U.S.C. 802(20); emphasis added).

Ellzey, 527 F. 2d 1306, 1308 (6th Cir. 1976); *United States* v. *Rosenberg*, 515 F. 2d 190, 193 (9th Cir.), cert. denied, 423 U.S. 1031 (1975); *United States* v. *Black*, 512 F. 2d 864, 866-867 (9th Cir. 1975); *United States* v. *Green*, 511 F. 2d 1062, 1066-1068 (7th Cir.), cert. denied, 423 U.S. 1031 (1975); *United States* v. *Badia*, 490 F. 2d 296, 298-299 (1st Cir. 1973).[7]

Petitioner asserts (Pet. 7) that the decision in this case is in conflict with *United States* v. *Leigh*, 487 F. 2d 206 (5th Cir. 1973). In *Leigh* the court dismissed an indictment charging that the defendant, a physician, had knowingly distributed a controlled substance to a patient. As the same court explained in *United States* v. *Miranda*, 494 F. 2d 783, 786 (5th Cir.), cert. denied, 419 U.S. 966 (1974), the defect in the indictment in *Leigh* was that it failed to charge any illegal conduct:

> By identifying Leigh as a medical doctor, the indictment placed him with a class of persons who are registered to dispense controlled substances as a matter of right. * * * By further averring that a prescription was used to distribute the controlled substance, the activity alleged on the face of the indictment could be legal. * * * The indictment was dismissed because it did not allege that the act of distribution was unlawful.

Here, by contrast, the indictment specified that petitioner had engaged in the unlawful distribution of a controlled substance by acting outside the usual course of professional practice in issuing orders purporting to be prescriptions (C.A. App. 5a-17a). The decision in this case is therefore not in conflict with *Leigh*.

2. Petitioner contends (Pet. 8-14) that he was deprived of a fair trial by three instances of alleged prosecutorial misconduct.

a. Petitioner first argues (Pet. 8-10) that the prosecutor engaged in prejudicial misconduct when he failed to comply with a pretrial order directing him to furnish certain items to petitioner.

The district court issued an order prior to trial directing the government to disclose all documents and physical objects intended to be used as exhibits at trial. Pursuant to this order, petitioner was given access to most of the government's exhibits prior to trial. In a number of instances, however, the government did not furnish exhibits until the eve of trial or until trial had begun. But, in each of these instances, petitioner's counsel objected, and the district court refused to admit the evidence until defense counsel had had an opportunity to examine the document and to prepare adequately for cross-examination (Pet. App. 20). Petitioner has not demonstrated any prejudice from this delay that deprived him of a fair trial.

b. Petitioner argues (Pet. 10-11) that he was prejudiced when the prosecutor failed to comply with a pretrial order directing him to inform petitioner of any agreements between the government and its witnesses that could

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[7]As the First Circuit explained in *United States* v. *Badia*, *supra*, 490 F. 2d at 298 n.4:

> We think the reason Congress included the term "dispense" in §841(a)(1) was to compel physicians to become properly licensed. If not licensed, a physician could then be convicted of unlawful dispensing. However, once licensed, he could not be convicted of unlawful dispensing because * * * the statute defines the term in and of itself as a lawful act.

In *United States* v. *Moore*, *supra*, the defendant physician was prosecuted for both unlawful distributing and dispensing of controlled substances. As the Tenth Circuit stated in *United States* v. *Fellman*, *supra*, 549 F. 2d at 182-183, this Court's opinion in *Moore* "leaves little, if any, doubt that physicians may be prosecuted for *both* unlawful dispensing and distributing when their activities go beyond the usual course of professional practice" (emphasis by the court).

conceivably influence their testimony. Petitioner claims that the government violated this disclosure order by failing to inform petitioner of its agreement not to prosecute Taylor Linkfield, who testifed at trial that he had used Demerol with Howell and petitioner and that the Demerol they used was obtained with prescriptions written by petitioner (II Tr. 165-172).

During trial, but before Linkfield testified, the prosecutor released the transcript of Linkfield's grand jury testimony to petitioner. This transcript showed that Linkfield had been advised before the grand jury that, in return for his testimony, he would not be prosecuted in connection with the offenses charged against petitioner. Since petitioner was thus informed before Linkfield testified at trial that the government had agreed not to prosecute him, and since petitioner thoroughly cross-examined Linkfield about this agreement at trial (II Tr. 167, 179-180), petitioner was not prejudiced by any failure to reveal earlier the assurances given to Linkfield.

c. Finally, petitioner argues (Pet. 11-13) that the prosecutor engaged in prejudicial misconduct by eliciting from a witness the fact that there was a homosexual relationship between petitioner and Howell. When this matter was first mentioned at trial, petitioner objected (II Tr. 197), and the prosecutor explained to the court that evidence of the relationship was necessary to establish petitioner's motive for providing Demerol tablets to Howell (II Tr. 198). The judge sustained the objection without any explanation and instructed the jury not to consider the witness's response (*ibid.*). The court of appeals concluded that the elicitation of petitioner's homosexual relationship with Howell was improper because the government failed to demonstrate how it was probative of petitioner's guilt; the court stated that in

these circumstances the prejudicial aspects of the evidence outweighed its probative value (Pet. App. 23). The court nevertheless affirmed the convictions on the drug counts because of "the overwhelming nature of the proofs as to those offenses." *Id.* at 23-24.

The court of appeals' disposition of this issue was proper. The claimed prosecutorial misconduct was not "so prejudicial as to deprive petitioner of a fair trial." *New York Central R.R.* v. *Johnson*, 279 U.S. 310, 316 (1929). It is well established that "whether improper conduct of Government counsel amounts to prejudicial error depends, in good part, on the relative strength of the Government's evidence of guilt." *Jones* v. *United States*, 338 F. 2d 553, 554 n.3 (D.C. Cir. 1964).[8] The evidence showing petitioner's guilt on the drug charges was overwhelming, and the brief reference to the homosexual relationship, which the jury was immediately instructed to ignore, was harmless beyond a reasonable doubt (Pet. App. 23-25). See *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967).

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[8]Thus, the court of appeals noted in this case that the proof of involuntary manslaughter was "tenuous" (Pet. App. 24) and that the prosecutorial misconduct may have been prejudicial as to that count. The evidence on the drug charges, however, was "overwhelming" (Pet. App. 23) and "as to these counts, the prosecutorial abuse * * * was harmless beyond reasonable doubt" (Pet. App. 25, amending Pet. App. 24).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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